IT'S A "LIKE": FACEBOOK CLASS CERTIFICATION OVERTURNED BY APPEAL COURT

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Background

In a recent ruling from the British Columbia Court of Appeal ("**BCCA**"), a class action was de-certified involving a claim by disgruntled Facebook users who allegedly had their images reproduced in Facebook advertising without their consent.

In January 2011, Facebook began making advertising revenue from a product called Sponsored Stories. Facebook took the names and images of Facebook users and featured them in advertisements sent to the users' contacts -allegedly without the knowledge or consent of the person featured in the ad.

The representative Plaintiff claimed that Facebook acted contrary to section 3(2) of B.C.'s *Privacy Act*[1] which provides that it is an actionable tort for a person to use the name or portrait of another person without their consent for advertising or promotional purposes. In considering whether to grant the class certification, the British Columbia Supreme Court ("**BCSC**") was first required to consider whether it should assume jurisdiction over the Plaintiff's claim in spite of a forum selection clause in Facebook's Terms of Use, agreed to by all Facebook users, which held that any claims must be made in California (the "**Forum Selection Clause**").

Facebook originally applied to the BCSC in 2014 to request that the Court decline to hear the case on the basis that it was not the correct venue because of the Forum Selection Clause in favour of the California courts. Ms. Douez relied on section 4 of the *Privacy Act*, which favoured the BCSC as having the sole jurisdiction to decide Privacy Act claims, to rebut Facebook's application. The BCSC rejected Facebook's assertion that it should decline jurisdiction in favour of the California courts and certified the class proceeding in B.C.[2]

Facebook launched an appeal to the BCCA.

Appeal Decision[3]

Analytical Framework and Evidentiary Burden

In overturning the lower court's ruling, the BCCA noted that on an application for a stay of proceeding by a

party relying on a forum selection clause, the court must consider the Pompey[4] test and the *Court Jurisdiction and Proceedings Transfer Act*[5] (the "**CJPTA**") analysis to determine whether or not to decline to exercise its territorial competence over a particular dispute.

The *Pompey* test requires the party relying on the forum selection clause to show it is valid, clear, and enforceable, and that it applies to the cause of action. Once that is proven, the burden of proof shifts to the other party to show "strong cause" why the court should not enforce the forum selection clause.

Section 11 of the CJPTA provides that a court may decline to exercise its territorial competence if another court is the more appropriate forum to hear the proceeding, which is determined by several considerations enumerated in section 11(2).

The BCCA, bound by the decisions in *Preymann*[6] and *Viroforce*[7], concluded the *Pompey* test is a separate inquiry that is conducted before the CJPTA analysis.

The BCCA also summarized the evidentiary burden on stays of proceedings as follows:[8]

a. When a defendant relies on a forum selection clause, the *Pompey* test applies. The defendant does not need to adduce expert evidence indicating that the forum chosen in the forum selection clause would have territorial competence under its own law. Rather, once the burden switches to the plaintiff to prove strong cause, the plaintiff may chose to adduce expert evidence as support for strong cause that the forum chosen in the forum selection clause would lack territorial competence under its own law; therefore, effectively operating as an exclusion of liability clause.
b. When a defendant does not rely on a forum selection clause, it is just the analytical framework in section 11 of the CJPTA that applies. In most cases, the evidentiary burden will be on the defendant to adduce evidence from an expert in the law of the defendant's preferred forum to show that forum would have territorial competence under its own law. The CJPTA requires a judge to "consider" not "decide" the law to be applied.

Does section 4 of the *B.C. Privacy Act* override the Forum Selection Clause?

The trial judge held that section 4 of the B.C. *Privacy Act* trumped the Forum Selection Clause because the *Privacy Act* confers exclusive jurisdiction on the BCSC to the exclusion of all other courts worldwide. The BCCA concluded the trial judge erred in her interpretation by failing to give effect to the principle of territoriality that B.C. law only applies in B.C. and the legislature is powerless to affect the law of other jurisdictions. As such, section 4 only confers jurisdiction to the BCSC to the exclusion of other B.C. courts.

B.C. law only has effect outside of B.C. when other jurisdictions choose, usually by a choice of law rule, to provide in their own law that B.C. law will apply. Accordingly, it was for Ms. Douez to establish that section 4 of

the *Privacy Act* applied extraterritorially in California, which she did not. In the absence of evidence to the contrary, California courts can decide for themselves, using California law, whether they have territorial competence over any given proceeding. Moreover, the BCCA noted the language of section 4 provides that this section confers exclusive jurisdiction "despite anything contained in another Act," not despite anything contained in a contract such as the Terms of Use between Facebook and its users.

Conclusion

The BCCA concluded the trial judge erred in her interpretation of section 4 of the *Privacy Act*. The BCCA agreed with Facebook that the Forum Selection Clause should be enforced and Ms. Douez could bring her action in California. As a result of the BCCA's conclusion on the Forum Selection Clause it rendered moot Ms. Douez's application to certify the action as a class proceeding and the claim was de-certified.

The variety and number of privacy based class claims for online activities continues to accelerate. This welcome clarification on the enforceability of terms of use, including forum selection clauses, will be a definite "like" for those companies offering internet based services who rely on such terms to govern their and their customers' conduct.

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[1] *Privacy Act*, RSBC 1996, c 373, s 3(2).

[2] *Douez v Facebook Inc.*, 2014 BCSC 953.

[3] *Douez v Facebook Inc.*, 2015 BCCA 279 [BCCA decision].

[4] *Z.I. Pompey Industrie v ECU-Line N.V.,* 2003 SCC 27.

[5] *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 20003, c. 28.

[6] *Preymann v Ayus Technology Corporation*, 2012 BCCA 30.

[7] *Viroforce Systems Inc. v R&D Capital Inc.*, 2011 BCCA 260.

[8] BCCA decision at para 41.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.


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